No. 96-1662 (10)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

TRANS WORLD AIRLINES, INC.,
Petitioner,

v.

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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RESPONDENT'S BRIEF

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QUESTION PRESENTED

Under the Railway Labor Act, does an employer impermissibly "influence or coerce" the exercise of the right to strike by promising employees who abandon the strike preference over full term, more senior strikers in determining which pre-strike employees shall hold positions in the active, paid work force after the strike is over?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	5
ARGUMENT	9
I. INTRODUCTION	9
II. Under The Railway Labor Act, An Employer Generally May Not Prefer Crossovers To Full-Term Strikers For Post-Strike Positions In The Active Workforce, Because To Do So Interferes With The RLA's Overall Statutory Scheme Aimed At Preserving Continuity Of Operations Through Stability Of Labor Relations	14
1. The RLA and the Right to Strike	14
2. The RLA and Employer Self-Help During Strikes	20
3. The RLA and the Distribution of Post-Strike Jobs	33
III. This Court's Cases Decided Under The National Labor Relations Act, Insofar As They Are Relevant To The RLA Context, Are Consistent With The Proposition That TWA's Promise Of Preference To Crossovers Over More Senior Strikers Was Illegally Coercive Of The Right To Strike	40
CONCLUSION	50

TABLE OF AUTHORITIES

Cases: Page

American Ship Building Co. v. NLRB, 380 U.S. 300 (1965) 30
American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184 (1921) 18, 19, 39
Belknap v. Hale, 463 U.S. 49 (1983) 43
Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969) ..... *passim*
Brotherhood of Ry. & S. C. v. Florida E. C. Ry. Co., 384 U.S. 238 (1966) ..... *passim*
Burlington N. R.R. v. B.M.W.E., —— U.S. ——, 107 S.Ct. 1841 (1987) 14, 15, 20, 21, 23
Capitol Husting Co. v. NLRB, 671 F.2d 237 (7th Cir. 1982) 46
Chicago & N.W. Ry. Co. v. United Transportation Union, 402 U.S. 570 (1971) 21, 25
Communications Workers v. Beck, —— U.S. ——, 56 L.W. 4857 (June 29, 1988) 18
Copaz Packing Corp., 115 NLRB 1008 (1983) 49
Detroit & T. S.L.R.R. v. United Transportation Union, 396 U.S. 142 (1969) 22, 25
Elgin, J. & E. Ry. Co. v. Burley, 325 U.S. 711 (1945) 22, 23, 29
Empresa Ecuatoriana de Aviacion v. District Lodge, 690 F.2d 838 (11th Cir. 1982) 28
Erie Resistor Corp., 132 NLRB 621 (1961) 45
Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275 (1946) 35, 37, 38
Franks v. Bowman Transportation Co., Inc., 424 U.S. 747 (1976) 10
George Banta Co., 256 NLRB 1497 (1981) 49
George Banta Co. v. NLRB, 686 F.2d 10 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983) 41, 47
Giddings & Lewis Inc. v. NLRB, 675 F.2d 926 (7th Cir. 1982) 41
Hot Shoppes, Inc., 146 NLRB 802 (1964) 43
Imperial Outdoor Advertising, 192 NLRB 1248 (1971) 46
Independent Fed'n of Flight Attendants v. Trans World Airlines, 682 F. Supp. 1003 (W.D. Mo. 1988) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

International Ass'n of Machinists & Aerospace Workers v. J.L. Clark Co., 471 F.2d 694 (7th Cir. 1972) 41, 47
International Association of Machinists v. Street, 367 U.S. 740 (1961) 29
Leveld Wholesale, Inc., 218 NLRB 1344 (1975) 46
Mackay Radio & Telegraph Co., 1 NLRB 201 (1936) .....
McCormick-Shires Millwork, Inc., 286 NLRB No. 68 (1987) 46
Nashville Gas Co. v. Satty, 434 U.S. 136 (1977) 13
National Airlines v. International Ass'n of Machinists, 416 F.2d 998 (5th Cir. 1969) 28
NLRB v. Crompton-Highland Mills, 337 U.S. 217 (1949) 25
NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963) ..... *passim*
NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967) 41, 44, 45
NLRB v. Granite State Joint Bd., 409 U.S. 213 (1972) 38, 39
NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967) 45
NLRB v. Katz, 369 U.S. 736 (1962) 25
NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1938) 8, 10, 41, 43, 44
NLRB v. Mars Sales & Equipment Co., 626 F.2d 567 (7th Cir. 1980) 41
Oakley v. Louisville & N. R.R., 338 U.S. 278 (1949) 13
Radio Officers Union v. NLRB, 347 U.S. 17 (1954) 17
Taft Broadcasting Co., 163 NLRB 475 (1967) 25
Trans World Airlines v. Independent Fed'n of Flight Attendants, 640 F. Supp. 1108, *aff'd*, 809 F.2d 483 (8th Cir. 1987), *aff'd per curiam*, —— U.S. ——, 108 S.Ct. 1101 (1988), pet. for reh'g pending 1, 26

TABLE OF AUTHORITIES—Continued

	Page
United Industrial Workers v. Board of Trustees of Galveston Wharves, 400 F.2d 320 (5th Cir. 1968)	28
Statutes:	
National Labor Relations Act, 29 U.S.C. § 151 *et seq.*	
§ 8(a)(3), 29 U.S.C. § 158(a)(3)	17, 18
Railway Labor Act, 45 U.S.C. § 151 *et seq.*	
§ 2 First, 45 U.S.C. § 152 First	24, 25, 27
§ 2 Third, 45 U.S.C. § 152 Third	18
§ 2 Fourth, 45 U.S.C. § 152 Fourth	*passim*
§ 2 Seventh, 45 U.S.C. § 152 Seventh	24, 27
§ 6, 45 U.S.C. § 156	24, 25
Legislative Materials:	
H.R. Rep. No. 1944, 73d Cong., 2d Sess. (1934)	18
H.R. Rep. No. 2243, 74th Cong., 2d Sess. (1936)	28
S. Rep. No. 606, 69th Cong., 1st Sess. (1926)	22
S. Rep. No. 895, 74th Cong., 1st Sess. (1935)	28
S. Rep. No. 1065, 73d Cong., 2d Sess. (1934)	18
United States Senate, Committee on Labor & Public Welfare, *Legislative History of the Railway Labor Act, As Amended* (1974)	*passim*
Hearings Before the Committee on Interstate Commerce on the Railway Labor Act, 69th Cong., 1st Sess. (1926)	19
Hearings on S.3266 Before the Committee on Interstate Commerce, 73d Cong., 2d Sess. (1934)	17
Hearings on S.2496 Before the Committee on Interstate Commerce, 74th Cong., 1st Sess. (1985)	23, 21
Miscellaneous:	
Meyers, *The Analytic Meaning of Seniority*, in Proceedings of the Eighteenth Annual Meeting, Industrial Relations Research Ass'n (1966)	33
Summers & Love, *Work Sharing As An Alternative to Layoffs by Seniority: Title VII Remedies in Recession*, 124 V. Pa. L. Rev. 3, (1976)	34

RESPONDENT'S BRIEF

STATEMENT OF THE CASE

Since April 1, 1977, Respondent Independent Federation of Flight Attendants ("IFFA" or "the Union") has been the certified, duly designated exclusive bargaining representative under the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*, of all Trans World Airlines, Inc. ("TWA" or "the Company") employees in the flight attendant craft or class. (JA 18).[1] IFFA and TWA have been parties to a series of collective bargaining agreements, the most recent of which was signed in 1983 and which itself has been the subject of considerable litigation, pertaining to the continuing existence of its union security clause (and other provisions of the contract which were not properly altered following the submission of specific changes in those provisions through the RLA's bargaining processes).[2] It was when lengthy negotiations between the parties to amend this agreement broke down in March of 1986, leading to a two and a half month strike by the flight attendants, that the controversy in the instant case arose.

TWA chose to operate the airline during the strike and, in fact, had embarked months before on a flight attendant training program in order to have a ready supply of workers to fill strikers' positions if the need arose. (JA 97-100). In the first week of the strike, TWA hired approximately 1270 training school graduates as immediate replacements for striking flight attendants to work along side the small percentage of bargaining unit employees who chose not to join their fellow employees on

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[1] References to the Appendix to the Petition for Certiorari will be "App. Cert. ——," The Joint Appendix will be "JA ——," and references to TWA's brief on the merits will be "TWA Br. ——."

[2] *Trans World Airlines v. Independent Fed'n of Flight Attendants*, 640 F. Supp. 1108, *aff'd*, 809 F.2d 483 (8th Cir. 1987), *aff'd per curiam*, —— U.S. ——, 108 S.Ct. 1101 (1988), pet. for reh'g pending ("*TWA I*").

the picket lines. During the course of the strike, new hire replacements were added to the workforce as they graduated from the training academy. In addition, there were, as time went on, pre-strike unit employees who "crossed over" the picket lines to return to work; these "crossovers" numbered approximately 1280 by the end of the strike.[3] (App. Cert. 2, 60-61).

After the strike ended, fewer than 200 of the approximate 5000 full-term strikers were granted reinstatement to "available" positions in the active workforce. (App. Cert. 19). TWA refused to reinstate any of the other approximately 4800 strikers, instead retaining all of the newly hired replacements, including the 463 then still in training, and the entire group of crossovers, many of whom had less seniority than full-term strikers still still awaiting reinstatement. TWA did, however, later recall some of the unreinstated strikers in order of their seniority as vacancies arose. (App. Cert. 3).

IFFA initially brought this action in the district court claiming that TWA had committed discrimination in violation of the RLA by denying reinstatement to over 2000 of the full-time striking employees who had unconditionally offered to return to work at the end of the strike on May 17, 1986. The lawsuit is a declaratory judgment action and is premised in part on the theory that, assuming that these employees were simply economic strikers,[4] they

[3] TWA prefers the term "incumbent employees" to the term "crossovers." (TWA Br. S, n. 4). The latter terminology will be retained by IFFA, not only for the sake of consistency but also for clarity: The term "crossover" more aptly describes the group of employees in question. Even the small percentage of pre-strike unit employees who chose not to join the strike from the very beginning had to "cross over" their fellow employees' picket lines to continue working during the strike, as did the majority of the group who abandoned the strike at various stages to return to work.

[4] *See Independent Fed'n of Flight Attendants v. Trans World Airlines*, 682 F. Supp. 1005 (W.D. Mo. 1988) ("*IFFA v. TWA*"), holding the strike to be an economic strike.

should nonetheless have been reinstated to their pre-strike jobs in preference to certain of the newly hired replacements (including the 463 who had not completed their training before the strike ended), and to less senior crossover employees.[5]

On cross-motions for partial summary judgment, the district court ruled in favor of the Union by holding that the approximately 463 newly hired replacements who were still in training at the time the strike ended could not lawfully be granted preference in employment over the full-term strikers. That court ruled in favor of TWA in holding that the approximately 1200 newly hired replacements and 1280 crossovers could lawfully be given such preference and retained at the end of the strike at the expense of the full-term strikers. (App. Cert. 22-35). With regard to the question here for the Court involving the crossovers, the district court acknowledged that there was virtually no direct case precedent covering the issue. Nevertheless, that court held that:

> The inducement of permanent rather than temporary employment is deemed presumptively needed to attract new hires, according to the Court in the landmark decision of *NLRB v. Mackay Radio Co.*, 304 U.S. 333 (1938). Inducement of similar attractiveness would seem normally required to retain old employees during a strike, or to attract them back. . . . If *Mackay Radio* is sound (and I recognize that some academic critics advocate disabling employers from hiring permanent replacements for strikers)

[5] As here pertinent, IFFA's complaint stated two different causes of action. The first complained of the preference accorded crossovers over full-term strikers in awarding positions in the active workforce once the strike was over, and is the cause of action presently before the Court. (App. Cert. 52-55). The second sought to establish that it was not necessary for TWA to offer permanent jobs to the replacements hired from outside the pre-strike workforce and that TWA therefore violated the RLA by doing so. (App. Cert. 55-56). The second cause of action has not yet been tried and is still pending.

> the same principle would seem to apply to protect crossovers. [App. Cert. 24-25].

In addition, the district court rejected IFFA's argument "that the Railway Labor Act should be interpreted to give greater protection for strikers than is conferred by the [NLRA]." (App. Cert. 25)

On cross appeals by the parties, the Eighth Circuit affirmed those portions of the district court's ruling permitting TWA to retain the 1200 newly hired replacements in active employment and finding it impermissible for the Company to have retained the approximately 463 new hires still in training at the time the strike ended. The Court of Appeals, however, reversed the lower court's ruling with regard to the crossovers, holding that it was unlawful discrimination for TWA to have retained the entire group of crossovers in active employment at the end of the strike in preference to more senior full-term striking employees. The Eighth Circuit held that this constituted impermissible discrimination because TWA's choice was based upon the extent of the striking employees' union activity and loyalty as reflected in how long each employee spent on strike. (App. Cert. 7-10):[6]

[6] At one point in its opinion, the court of appeals articulated the principle applied as being that "TWA may not discriminate among union *members* based on the degree of their union activity," (App. Cert. 7 (emphasis supplied)), and for that reason laid stress upon the fact than in *TWA I*, the court of appeals had held previously that the union security clause continued in effect during the strike. TWA spends a large portion of its brief (TWA Br. 31-38) refuting this reliance on the union security portion of the collective bargaining agreement. It appears, however, that the court of appeals simply used language at that point in its opinion that fails to distinguish between *unit* members—that is, those employees represented by the union before the strike—and *union* members, and for that reason thought the union security provisions pertinent. The bulk of the court of appeals' reasoning, however, does not rely on the strikers' union membership or lack thereof. This brief proceeds on the premise that the union security clause is indeed *irrelevant*, but that the court of appeals' result, and the basic thrust of its reasoning, are nonetheless correct.

In *NLRB v. Erie Resistor Corp.*, [373 U.S. 221 (1963)], the Supreme Court upheld the NLRB's decision that an award of super-seniority to permanent replacements and cross-overs unlawfully discriminated against those who engaged in union activity. 373 U.S. at 231-32. Although TWA has not awarded super-seniority to the employees who worked during the strike, several of the concerns voiced by the Court in *Erie Resistor* are applicable to the status of the cross-overs here.

The Court disapproved of super-seniority because the award operated to the detriment of strikers as compared to nonstrikers: it in effect offered an inducement to abandon the strike; and it created a long-term division among the workforce. *Id.* at 231. Although an award of super seniority brings these concerns into a sharper focus than does the conferring of permanent replacement status to cross-overs, these concerns are nonetheless present. Awarding the cross-overs permanent replacement status differentiates employees on the basis of their union activities, induces employes to abandon the strike and is likely to create long-term conflict and division within the workforce . . . [App. Cert. 8-9].

SUMMARY OF ARGUMENT

I. In this case, the employment relationship is a fluid one; flight attendants move in and out of the paid work force frequently, and, while on paid status, change monthly the time, place, and nature of their work assignments. In distributing work assignments to and among the active workforce, TWA and IFFA agreed to apply seniority principles so that at any given moment, job security and job satisfaction would be distributed according to length of service.

The method TWA used for deciding which of the employees in the unit that went on strike would be in the active workforce after the strike fundamentally rearranged this system, and the expectations of the employees inherent in the system. By setting up a competition

among employees for the post-strike jobs based upon the speed with which each employee abandoned the collective strike effort, TWA revamped a neutral system of distributing work among employees into one which had both the purpose and effect of discouraging continued adherence to concerted strike activity. The question in this case is thus not whether TWA's treatment of crossovers in its striker reinstatement program had a coercive impact upon the exercise of the right to strike—that much is plain—but whether the Railway Labor Act sanctions such employer action in a strike situation despite its coercive impact.

II. 1. In determining the kinds of employer responses to employee strike activity that are permitted by the RLA, the appropriate starting place is the nature of the protection accorded the right to strike under the RLA. As this Court has explicitly held, the right of employees to strike is an integral part of the RLA statutory scheme. That right is protected not only from governmental prohibition but, as well, from employer retaliation: § 2 Fourth of the RLA makes it unlawful for an employer "to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization." As this Court's cases make clear, exercise of the right to strike as a means of achieving the employees' economic goals is an essential aspect of union membership. Thus, § 2 Fourth necessarily includes protection from employer retaliation for strike participation.

2. A. If TWA's grant of employment preferences to crossovers were valid, that must be because the explicit statutory prohibition against coercive employer action is limited by some *implied* privilege to burden the right to strike by providing certain economic benefits to individuals who abandon the strike effort. In evaluating the claim that such a privilege exists under the RLA, two approaches suggested on the petitioner's side must be rejected: On the one hand, there is no basis for importing the details of NLRA law into the RLA wholesale. On the other hand, there is certainly no basis, given the explicit protection contained in § 2 Fourth, for presuming that the RLA, unlike the NLRA, permits unlimited self-help by both employees and employers, regardless of the detrimental impact on the overall statutory scheme. Thus the task here is to examine the RLA's structure and purposes in their own terms and to interpret the statute accordingly.

B. Following this approach, several interrelated principles emerge. First, as a general matter, the RLA embodies a greater concern for the overall stability of labor relations than does the NLRA. Indeed, this difference was the raison d'etre for including the airline industry in the RLA rather than in the NLRA. In pursuit of this stability concern, the RLA views any use of economic weapons as only a temporary interruption in an otherwise continuous relationship.

Second, and more specifically, the RLA envisions continuity of three kinds between the pre- and post-strike periods: (1) the terms and conditions of employment that are not the subject of the dispute ordinarily remain in place during and after a strike; (2) mass turnover of employees, or other disruptions of the employer-employee relationship because of a strike, are disfavored; and (3) maintenance of the pre-strike bargaining relationship, and of the capacity of employees to engage in collective action, is favored.

At the same time, the RLA does envision effective employer (as well as employee) self-help and to some degree erects a preference (not present in the NLRA) in *favor* of continuous operation. This Court, in *Brotherhood of Ry. & S.C. v. Florida E. C. Ry.* ("F.E.C."), 384 U.S. 238, 246-47 (1966), recognized that these policies permit *some* compromise of the RLA's continuity principles during a strike. However, *F.E.C.* also establishes that any deviations from pre-strike circumstances

should ordinarily be temporary, and must be proved to be "reasonably necessary" to the employer's continued operations.

3. The approach mapped out in *F.E.C.* applies here as well. Like the employer self-help involved in *F.E.C.*, TWA's policy regarding poststrike preference of crossovers threatens all three stability concerns of the RLA. And, while it is possible that an employer could demonstrate the necessity of such a preference in order to continue operations, no such demonstration has been made here nor can employer necessity be presumed. Crossovers are not giving up other permanent jobs, and loss of livelihood for a prolonged period during the strike standing alone may well be enough to induce returns to work.

III. Insofar as it is relevant under the RLA, nothing in the NLRA caselaw relating to strike replacement issues undermines this analysis. *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938) established not one but two principles: First, that an employer may not discriminate against former strikers in reinstatement by disfavoring those most active in the strike effort; and second, in dictum, that in order to operate during a strike, an employer is privileged to assure newly hired strike replacements permanent status.

Later cases of this Court make clear that the second principle of *Mackay* was not intended to swallow the first. Rather, the *Mackay* rule regarding the offering of permanence to replacements is a limited exception to the general principle that employers may not take actions that on their face treat union adherents detrimentally as compared with those who do not exercise their right to support a striker. In particular, *Mackay* does not sanction (1) employer promises of permanence that go beyond that necessary to continue operations during a strike; or (2) employer promises of preference for crossovers (as opposed to promises of permanence to outside strike replacements), with the more profound impact

upon exercise of collective rights that results from setting up a competition *among* the members of the group that decided to strike. And *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963) affirmatively indicates that employer policies with the latter effect are to be scrutinized more closely than those that do not have such an impact. Thus, while it is not clear that this case would be decided the same way under the NLRA as we argue it should be decided under the RLA, there is no barrier in the NLRA cases or their reasoning to the result for which we argue.

ARGUMENT

I. Introduction

Because of the nature of the industry in which they work, flight attendants face an unusually fluid employment situation:

> The IFFA-TWA Agreement does not refer to flight attendant "positions," [with an exception not here pertinent]. . . . Instead the IFFA-TWA Agreement refers generically to "categories" and/or "classifications." Flight attendants do not have regular shifts. Flight attendants report for duty, from day to day, at different times and different locations. Flight attendants, from day to day and even within the same day, work on different air craft. . . . In case of furlough (layoff) and displacement due to reductions in force, flight attendants have options to move into different categories and different domiciles. By the same token, flight attendants who have been furloughed or displaced have recall rights not to domicile but to classification only. [Affidavit of Victoria Lee Frankovich filed Aug. 22, 1986 with Supplemental Suggestions Re Motion for Partial Summary Judgment].

This fluidity characterizes not only assignment while on active duty but, as well, movement into and out of the active, paid workforce:

> Displacement of Flight Attendants from one category to another, from one geographic location to

another and furlough to the street have been routine and common occurrences at TWA. The causes for these actions include seasonal reductions in operation, transfer of flying time between one domicile and another, change in size of equipment flown, changes in cabin staffing (crew complement) and other causes. [For example because of] [f]urlough and displacement activity in 1984 . . . no less than 293 Flight Attendants were geographically relocated; 420 Flight Attendants were furloughed to the street, and an additional 23 Flight Attendants elected furlough to the street rather than geographic displacement . . . . [Affidavit of Victoria Lee Frankovich filed Oct. 6, 1986 with Suggestion in Opposition to TWA's Motion for Stay; *see* JA 6].

In response to this employment situation, TWA and IFFA (and IFFA's predecessors) developed over the years a particularly complex scheme in which competitive seniority determines nearly every aspect of the employment relationship that involves making choices between employees.[7] Thus, as a general matter, "seniority [governs] all employees in case of furlough due to reduction in forces, reemployment after furlough, choice of vacancies, and preference of assignment to equipment" (JA 27), and is the decisive factor as well in the complicated bidding system for determining, *each month*, which flight attendants fly which equipment, from and to which cities, at which times (JA 43-62). Similarly, employees returning from leaves of absence may bid, according to seniority, "on any vacancy existing on the system" and, if unsuccessful in that bid "may displace the least senior employee in her or his status on the operation on which the returning employee was assigned immediately prior to the leave, provided that such employee is senior to the

[7] As this Court has noted, even in modern unionized work places in which there is a more stable employment relationship than in this case, seniority determines many incidents of the employment relationship. *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747, 766-67 (1976).

employee being displaced." (Stipulations, Exhibit 1, Art. 15D, pp. 91-92).

The outcome of the pervasive competitive seniority system is that ordinarily the workforce is arranged so that at any given time, the more senior the flight attendant, the more secure and the more satisfactory—in terms of location, assignment, and schedule—is his or her employment situation. With the advent of the strike that gave rise to this lawsuit, TWA determined fundamentally to disrupt the relative seniority situation among the employee group who, collectively by majority vote, determined to strike in support of their bargaining demands after negotiations and mediation had failed to produce agreement.[8]

Before the strike in this case began, and thus without attempting to operate during the strike by other means (App. Cert. 24), the employer made several related announcements. First, the company intended to "continue its flight operations if the Union calls a strike" by, *inter alia*, hiring new flight attendants who "will not be furloughed or displaced to make room for returning strikers." (JA 120-21). Second, in determining which of the pre-strike employees would be eligible to fill any positions *not* awarded to newly-hired replacements at the conclusion of the strike, "returning strikers will be offered jobs on a first come, first served basis." (JA 121). *See also* JA 100-01. ("Those Flight Attendants who work during the strike will not be furloughed to make room for strikers (regardless of seniority) who later offer to return"). Third, TWA specifically promised that any flight attendants who returned to work during the strike would have the opportunity to bid for more desirable domiciles[9]—such as Los Angeles—and for promotions to

[8] ". . . IFFA sought and received from its members 'overwhelming authorization to strike.'" *IFFA v. TWA*, 682 F. Supp. at 1008.

[9] A "domicile" within the meaning of the TWA-IFFA collective bargaining agreement is the city in which a flight attendant is based, in the sense that he or she is supervised by management

service manager vacancies; "[a]ny transfers so awarded will remain effective after the strike is over." (JA 121).[10]

It is plain the purpose of making these announcements was precisely to induce incumbent employees not to join the strike effort, or to abandon that effort after the strike began.[11] And it is self evident as well that the likely effect of this scheme was to deter employees from exercising their right to strike, by setting up a competition among members of the pre-strike bargaining unit that could be won only by abandoning the collective effort more quickly than other employees. Finally, it is apparent as well that the impact of TWA's scheme would not evaporate on the day the Union finally bowed to the pressure created by that scheme: Long after the strike was over, and as among employees in the active workforce, the effect of TWA's crossover program would be to cement those who crossed the picket line into more desirable jobs than the jobs available to more senior recalled full-term strikers who, but for the strike, would have been entitled to the

located in that city, and scheduled out of that city. (JA 43 *et seq.*). There is, of course, no requirement that the flight attendant actually reside in that city, but those who live far from their domiciles will necessarily spend much unpaid time "commuting" to their domicile in order to be present in time for flights scheduled to leave from that city.

[10] Each of those promises was reiterated and reinforced in the early days of the strike. Thus, on March 14, 1986, seven days after the strike began, TWA sent a letter to all flight attendants assuring that striking flight attendants who returned to work during the strike would not be displaced at the end of the strike (JA 104). A similar communication, by mailgram, was sent on March 17; that communication provided a "guarantee [that] if you work throughout the remainder of the strike you will not be replaced when the strike is over," and indicated that due to transfer awards to be made on March 21, all cabin attendant domicile vacancies in certain locations—San Francisco and Los Angeles—"are likely to be filled by March 21." (JA 104-05).

[11] To make this statement is not to prejudge the outcome of this case. As we develop below (pp. 30-34, *infra*), the RLA does permit a limited range of employer options that adversely affect the striking employees and that are *necessary* to operating during a strike.

more desired classifications and domiciles.[12] Put another way, TWA's crossover program reordered indefinitely the internal relationship among pre-strike employees in a way likely to carry forward into the post-strike period the divisions among the pre-strike workforce that were created by TWA's crossover policy and that led to the demise of the strike.

The employer's position in this case is that under the Railway Labor Act, 45 U.S.C. § 151 et seq., TWA was privileged to confront striking employees with this "combination threat and promise [that] could be expected to undermine the strikers' mutual interest and place the entire strike effort in jeopardy." *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 231-32 (1963). In support of this

[12] To take a concrete example: One can surmise from the way in which TWA advertised in its strike communications the availability of openings in Los Angeles and San Francisco that those two domiciles were the most sought after among the flight attendants. If this were the case, then one would expect that those two domiciles had a much more senior workforce than the others and that the likelihood of a junior flight attendant transeferring to either on the basis of competitive seniority was slim.

The very point of the system, in fact, is that the longer a flight attendant stays with the company, the more likely it is that the attendant will be able to relocate to California; indeed, much of the justification for using seniority as a principle for distributing workplace benefits and burdens is precisely that seniority discourages turnover and encourages stable employment. *Cf. Nashville Gas Co. v. Satty*, 434 U.S. 136, 143 n.5 (1973).

After the strike, however, the composition of the workforce in the sought-after domiciles would no longer reflect this value of employment stability. Instead, a disproportionate number of junior employees, *distinguishable from other employees only by the fact that those employees had abandoned the strike effort*, would be in the California workforce. To any reinstated full term striker who had planned to transfer to California when he or she had accrued sufficient seniority, and who now would be unable to do so for an indefinite period of time, the message is clear: "On the moving escalator of terms and conditions affecting this particular employment" (*Oakley v. Louisville & N. R.R.*, 388 U.S. 278, 283 (1949)), those within the active workforce who supported union activity are on a lower step with respect to some, albeit not all, desirable benefits than those who did not.

proposition, TWA relies principally upon cases decided by this Court under the NLRA. For reasons developed in Part III, *infra*, that reliance is misplaced; the NLRA cases do not directly address the question in this case, and the logic of those cases, and particularly of *Erie Resistor*, *supra*, supports the proposition for which we argue here. As we show in Part II, *infra*, however, this case can and should be decided under principles established by the statute directly at issue, the Railway Labor Act.

II. Under The Railway Labor Act, An Employer Generally May Not Prefer Crossovers To Full-Term Strikers For Post-Strike Positions In The Active Workforce, Because To Do So Interferes With The RLA's Overall Statutory Scheme Aimed At Preserving Continuity Of Operations Through Stability Of Labor Relations.

1. *The RLA and the Right to Strike*: The origin and general scheme of the Railway Labor Act was recently outlined by this Court:

> The Railway Labor Act of 1926 "cannot be appreciated apart from the environment out of which it came and the purposes which it was designed to serve." *Elgin, J. & E.R. Co. v. Burley*, 325 U.S. 711, 751 (1945) (Frankfurter, J. dissenting). Following decades of labor unrest that persistently revealed the shortcomings of every legislative attempt to address the problems, representatives of railroad labor and management created a system for dispute resolution that Congress enacted as the RLA. The RLA subjects all railway disputes to virtually endless "negotiation, mediation, voluntary arbitration, and conciliation." *Detroit & Toledo Shore Line R. Co. v. Transportation Union*, 396 U.S. 142, 148-49 (1969). Moreover, the RLA requires all parties both "to exert every reasonable effort to make and maintain" collectively bargained agreements, § 2 First, and to abide by the terms of the most recent collective bargaining agreement until all the settlement procedures provided by the RLA have been exhausted, §§ 5, 6, 10; see *Shore Line*, *supra*, at

> 150-53. Nevertheless, if the parties exhaust these procedures and remain at loggerheads, they may resort to self-help in attempting to resolve their dispute, subject only to such restrictions as may follow from the invocation of an emergency board under § 10 of the RLA. [*Burlington N. R.R. v. B.M.W.E.*, —— U.S. ——, 107 S. Ct. 1841, 1850-51 (1987) (footnotes omitted)].

See also Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 378 (1969) ("Implicit in the statutory scheme . . . is the ultimate right of the disputant to resort to self-help—'the inevitable alternative in a statutory scheme which deliberately denies the final power to compel arbitration.'")

An integral part of this scheme is the protection of the right to strike, as this Court has explicitly held:

> The Court has indicated, without reference to the National Labor Relations Act, that employees subject to the Railway Labor Act enjoy the right to strike over major disputes. In *Brotherhood of Railway and Steamship Clerks Freight Handlers Express & Station Employees, AFL-CIO v. Florida E. C. R. Co.*, 384 U.S. 238, 244 (1966), we held that:
>
> > "The unions, having made their demands and having exhausted all the procedures provided by Congress, were therefore warranted in striking. For the strike has been the ultimate sanction of the union, compulsory arbitration not being provided."
>
> Similarly, in *Florida E. C. R. Co. v. Brotherhood of Railroad Trainmen*, 336 F.2d 172, 181 (1964), the Court of Appeals for the Fifth Circuit concluded that "when the machinery of industrial peace fails, the policy in all national labor legislation is to let loose the full economic power of each [party]. On the side of labor, it is the cherished right to strike." *Whether the source of this right be found in a particular provision of the Railway Labor Act or in the scheme of the Act as a whole, it is integral to the Act.* [*Brotherhood of R.R. Trainmen v. Jacksonville*

Terminal Co., 397 U.S. at 384-85 (emphasis supplied)].

See also id. at 386 ("Peaceful primary strikes . . . lie within the core of protected self-help under the Railway Labor Act.")

Contrary to the contention on the other side (TWA Br. 19-21; Brief of *Amicus Curiae* The Airline Industrial Relations Conference at 5-6 n.2; Brief for the National Labor Relations Board ("NLRB Br.") at 16-17 n.10), this "core" RLA right, which *Jacksonville Terminal* held is not defeasible through state regulation, may not be defeated through employer coercion either.[13] Section 2 Fourth of the RLA provides *first* that "[e]mployees shall have the right to organize and bargain collectively through representatives of their own choosing," and *second* that

> No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees . . . *or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization.* [Emphasis supplied].[14]

This provision, and the italicized language particularly, is closely analogous to § 8(a)(3) of the National Labor Relations Act, as amended, which provides:

> It shall be an unfair labor practice for an employer . . . [b]y discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

In construing § 8(a)(3), this Court has made clear that "membership in any labor organization" includes not only the bare act of joining but, as well, "the right . . . to join in or abstain from union activities without thereby affecting his job." *Radio Officers Union v. NLRB*, 347 U.S. 17, 42 (1954). Thus,

> Under § 8(a)(3), it is unlawful for an employer by discrimination in terms of employment to discourage "membership in any labor organization," which includes discouraging participation in concerted activities . . . . *such as a legitimate strike.* [*NLRB v. Erie Resistor Corp.*, 373 U.S. at 233 (emphasis supplied)].

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[13] Indeed, this Court in *Jacksonville Terminal* regarded as the more difficult question not whether the right to strike is protected from coercive employer actions but whether, as held in that case, the right to strike is *also* protected from state regulation:

> It has been suggested that [§ 2 Fourth] is "comparable to § 7 of the NLRA, which grants employees the right to "self-organization" and the right to engage in "concerted activities" and which, even apart from § 13, protects the right to strike, see, *e.g.*, *Amalgamated Ass'n of Street Electric Railway & Motor Coach Employees of America, Division 998 v. Wisconsin Employment Relations Board*, 340 U.S. 383, 389 (1951). . . . *However, § 2 Fourth was designed primarily, if not exclusively, to prohibit coercive employer practices.* [394 U.S. at 385 n.20 (emphasis supplied)].

See id. at 382 n.17 (distinguishing between "employee conduct which the States may not prohibit" and "conduct against which the employer may not retaliate"; the question in *Jacksonville Terminal* concerned state regulation, not employer coercion.)

[14] That § 2 Fourth was intended to include, within its proscription against "influenc[ing] or coerc[ing] employees," adverse employer actions affecting employees' job rights is both apparent from the breadth of the language used and explicit in the legislative history of the RLA. *See, e.g., Hearings on S.3266 Before the Committee on Interstate Commerce*, 73d Cong., 2d Sess. (1934) 13, 14-15, (statements of Joseph B. Eastman, Federal Coordinator of Transportation) ("influence . . . may be exerted after he becomes an employee by instilling in him the fear that if he does not do as the company wishes he may lose his job"). Indeed, this point is not in dispute; we do not understand TWA or its amici to maintain, for example, that if an employee were fired because he helped to organize a new union, the employee would have no recourse under § 2 Fourth. Rather, the contention seems to be that once a labor organization is in place and recognized by a carrier, the RLA provides no protection of any kind against employer retaliation for participating in the activities of that organization.

It is apparent that when Congress added § 2 Fourth to the RLA in 1934 and prohibited employers from coercing employees "in an effort to induce them to join or remain or not to join or remain *members* of any labor organization" (emphasis supplied), Congress had in mind essentially the same concept of what it means to protect union membership as the concept embodied in the NLRA just one year later. *Cf. Communications Workers v. Beck*, —— U.S. ——, 56 L.W. 4857, 4860 (June 29, 1988).[15]

The basic object of the 1934 RLA amendments was to provide *added* protection against employer interference with the internal organization and activities of unions, going beyond the protection in the choice of representative extended by the 1926 Act. S. Rep. No. 1065, Part 1, 73d Cong., 2d Sess. (1934) 2, *reprinted in* Committees on Labor & Public Welfare, United States Senate, *Legislative History of the Railway Labor Act as Amended ("RLA Leg. Hist.")* (1974) 821; H.R. Rep. No. 1944, 73d Cong., 2d Sess. (1934) 2, *reprinted in RLA Leg. Hist.* 919. Section 2 Fourth was added as a means toward that end. Indeed, to read the new section as dealing only with the protection of precertification organizing activities, would be to make the provision entirely redundant, since the preexisting § 2 Third already provided that protection.

Moreover, exercise of the right to strike had, by the time of the 1934 RLA amendments, long been recognized as perhaps the central reason for organizing unions in the first place, and a necessary concomitant of union membership:

> Labor unions . . . were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer. *They united to exert influence upon him and to leave him in a body in order by this inconvenience to induce him to make better terms with them.* [*American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 209 (1921) (emphasis supplied)].

[15] The Railway Labor Act as passed in 1926, Public Law No. 69-257, 44 Stat. 577 (1926), included a version of § 2 Third somewhat different from the one in the current Act, and did not include the equivalent of § 2 Fourth.

To protect employees from employer retaliation for organizing unions, but not to protect them from such retaliation when they take one of the very actions it is the purpose of unions to promote and which is at the "core" of the RLA statutory scheme, would have been a senseless endeavor.[16]

Thus, § 2 Fourth does protect employees from coercive employer action burdening the right to strike. The question in this case is whether, given the overall structure of the RLA, an employer violates that prohibition by promising post-strike job protection to employees so that those employees will abandon collective strike activity, thereby undermining the "laborers[']opportunity to deal on equality with their employer" (*American Steel Foundries*, 257 U.S. at 209).

[16] That the RLA contains no language like § 2(3) of the NLRA explicitly including strikers within the definition of "employees" does not signify that strikers are not "employees" within the meaning of the RLA, as petitioner implies. (TWA Br. 19). On the contrary, this subject was specifically discussed in the RLA's legislative history, where it was unequivocally stated, by a member of the union/industry committee that drafted the RLA (*see* n.17, *infra*), that "the mere fact of a strike does not terminate the [employment] relationship." *Railroad Labor Disputes: Hearing on H.R. 7180 Before the Committee on Interstate and Foreign Commerce*, 69th Cong., 1st Sess. 397 (1926) (statement of Donald R. Richberg, Counsel for the Organized Railway Employees). As Mr. Richberg also stated, this understanding was consistent with judicial rulings at the time. *Cf., e.g., Michaelson v. United States*, 266 U.S. 42, 67 (1924).

2 *The RLA and Employer Self-Help During Strikes*:

A. To recognize that the RLA, like the NLRA, protects the right to strike from coercive employer action is not to determine that the two statutes must be applied identically when questions arise concerning whether the right to strike has been unduly burdened. Rather, as this Court recognized in *Jacksonville Terminal*, while the RLA and the NLRA each protect the right to strike, the precise content of that protection varies because of differences between the two statutes concerning the precise role of self-help generally, and of strike activity particularly:

> [T]he National Labor Relations Act cannot be imported wholesale into the railway labor arena. Even rough analogies must be drawn circumspectly, with due regard for the many differences between the statutory schemes. *Cf. Brotherhood of Railroad Trainmen v. Chicago River & I.R. Co.*, 353 U.S. 30, 31 n.2 (1957).
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> • • •
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> [A]lthough, in the absence of any other viable guide, we have resorted to the NLRA for assistance in mapping out the general boundaries of self-help under the Railway Labor Act, *there is absolutely no warrant for incorporating into the Act the panoply of detailed law developed by the National Labor Relations Board and Courts. . . .* [*Jacksonville Terminal*, 394 U.S. at 383-84, 392].

We hasten to add that *Jacksonville Terminal's*, as well as *Burlington N. R.R.'s*, recognition that the RLA permits a broader range of secondary union activity than that permitted by the NLRA cannot be extrapolated to any general proposition supporting TWA's position in this case.

Those two cases do *not* indicate that once the various status quo periods contained in the RLA are exhausted, the scope of employer or employee self-help in the RLA is unlimited by the statute. To the contrary, in those two cases, the Court declined to imply into the Act a limitation

upon self-help that had no basis in the statute. As the Court stated, the RLA "allow[s] parties who have unsuccessfully exhausted [its] procedures for resolution of a major dispute to employ the full range of whatever peaceful economic power they can muster, *so long as its use conflicts with no other obligation imposed by federal law.*" *Jacksonville Terminal*, 394 U.S. at 392-93 (emphasis supplied).

Section 2 Fourth, as we have seen, does place an express limit upon the employer's power to enforce its will through use of its economic power over its employees' livelihood. The question in this case is whether TWA's actions, which indubitably *did* "influence or coerce employees in an effort to induce them" not to participate in the collective strike effort (*see* pp. 16-19, *supra*), violated the statute on this ground, or whether there is some privilege implicit in the statute permitting TWA to engage in this particular coercive activity as part of the self-help available when the statutory procedures designed to promote agreement have failed. Thus, this case, unlike *Jacksonville Terminal* and *Burlington N. R.R., does* involve "construe[ing] a particular provision of an Act in light of the Act's structure and purpose . . .," (*Burlington N. R.R.*, 107 S. Ct. at 1854 n.15), and is for that reason well within the realm of judicial competence.

B. There is, of course, no explicit answer to this question in the statute. But this is not surprising: The RLA was intentionally written in generalities, in the belief that " 'there is more danger in attempting to write specific provisions into the law than there is in writing the general duties and obligations into the law and letting the enforcement of those duties and obligations develop through the courts in the way in which the common law has developed . . . .' " *Chicago & N.W. Ry. v. United Transportation Union*, 402 U.S. 570, 577 (1971), *quoting* Hearings on the Railroad Labor Disputes (H.R. 7180) before the House Committee on Interstate and Foreign Commerce, 69th Cong., 1st Sess. 91 (1926). Following this approach and looking at the overall structure

of the RLA as construed by this Court, several interrelated principles emerge for determining when employer action that has the effect of discouraging or defeating a strike will be considered action violative of the § 2 Fourth of the RLA because that action "influence[s] or coerce[s] employees in an effort to induce them" to forego their right to strike, or to cease striking once they have begun.

(i) First, the overall goal of the RLA is "to encourage collective bargaining by railroads and their employees in order to prevent, if possible, wasteful strikes and interruptions of interstate commerce." *Detroit & T. S.L. R.R. v. United Transportation Union*, 396 U.S. 142, 149 (1969). The framers of the RLA took a subtle and long range view of how best to accomplish this goal.[17] Largely on the basis of the failure of earlier railroad legislation that had taken more authoritarian approaches, the framers eschewed compulsory arbitration on the one hand and prohibition of strikes on the other. Hearings before the Senate Committee on *Interstate Commerce* on S2306, 69th Cong., 1st Sess. (1926) 186: S. Rep. No. 606, 69th Cong., 1st Sess. 4 (1926), *reprinted in RLA Leg. Hist.* 103. Instead, the RLA endeavors, in the first place, to delay the use of economic self-help as a means of settling labor disputes in the hope that the delay itself, and the aids to consensual resolution available during the status quo periods, will encourage peaceful settlement of disputes. *Detroit & T. S. L. R.R. v. United Transportation Union*, 396 U.S. at 149-50. And secondly, in an attempt to "create an atmosphere in which rational bargaining can occur" (*Detroit & T.S.L. R.R. v. United Transportation Union*, 396 U.S. at 150), not only as to the present dispute but as

[17] As this Court has had frequent occasion to note, the Railway Labor Act was "legislation agreed upon between the railroads and the [national railroad unions] and [was] probably unique in having been frankly accepted as such by the President and Congress." *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711, 753 (1945) (Frankfurter, J., dissenting). *See, e.g., Detroit & T.S.L. R.R.*, 396 U.S. at 148 ("railroad and union representatives drafted the Act"); *Burlington N. R.R.*, 107 S. Ct. at 1852 n.13.

to future ones as well, the RLA establishes a system designed to limit the likelihood that such strikes as do occur will rupture or negatively affect the post-strike relationship between the employer and the labor organization representing its employees.

The "strike represents only an interruption in the continuity of the relation," and not an invitation for "labor-management relations to revert to the jungle." *Brotherhood of Ry. & S. C. v. Florida E. C. Ry ("F.E.C.")*, 384 U.S. 238, 246-47 (1966). The "assumption as well as the aim of the Act is a process of *permanent* conference and negotiation between the carriers on the one hand and the employees through their unions on the other." *Elgin, J & E. Ry. v. Burley*, 325 U.S. at 753 (Frankfurter, J., dissenting) (emphasis supplied).[18]

It is particularly noteworthy for present purposes that the main reason for amending the RLA to cover the airline industry in 1936 rather than including that nascent industry under the then-new NLRA was precisely the belief that the RLA is superior in fostering the stability of labor relations. Thus, the primary proponent of the bill to cover airlines under the RLA argued to the House Committee considering the bill:

> The success of the Railway Labor Act in not only avoiding a break-down in labor relations in the railroad industry but also in making for healthy and stable labor relations is attested to by the experience under the act since its approval in 1926 . . . . Would not this same purpose be accomplished if the air-transport industry and its employees were made subject to the proposed National Labor Relations Act—S. 1958—instead of the Railway Labor Act? The answer is to be found in the difference between the two statutes.
>
> The proposed National Labor Relations Act is confined chiefly to safeguarding the right of employees

[18] Justice Frankfurter's opinion in *Elgin*, albeit a dissent, insofar as it outlines the history and overall theory of the RLA has been repeatedly relied on by this Court, most recently in *Burlington N. R.R.* *See* p. 14 *supra*, quoting 107 S.Ct. at 1850-51.

to organize for the purpose of collective bargaining. . . . The act as proposed, while it seeks to encourage duly chosen representatives of employers and employees to bargain collectively, does not provide for the orderly processes of notice, conference, mediation, arbitration, fact-finding, and conciliation available in the event of a labor dispute in those industries subject to the Railway Labor Act. *In an industry such as air transportation, so largely charged with responsibility to the public, and in which safety is such a large element, it is of special importance that every legal safeguard which long experience in labor relations has shown to be workable should be adopted by way of insurance against lowering of the morale of the service and break-down in labor relations.* This purpose would be accomplished for the air-transport industry by the Railway Labor Act. [*Hearings on S. 2496 Before the Committee on Interstate Commerce*, 74th Cong., 1st Sess. (1935) 21 (emphasis supplied) (remarks of Mr. Beyer).]

(ii) In particular, in attempting to contain the damaging impact of occasional episodes of economic warfare upon the overall stability of labor relations between an employer, his employees and their chosen union, the RLA preserves the "continuity of the relation" (*F.E.C.*, 384 U.S. at 246) in three ways.

First, the statute attempts to focus the use of economic weapons upon the substantive matters that were actually in dispute, rather than permitting the parties to broaden the conflict during the economic warfare period beyond those particular issues that had given rise to the dispute in the first place. Thus, for example, with one limited exception (*see* discussion of *F.E.C.*, *infra* pp. 30-32) an employer may *not* change collectively-bargained wages, rules, or working conditions unless notice is given as to the particular change requested, and the statutory negotiation and mediation processes are exhausted (*see* § 2 Seventh; § 6)[19]:

[19] Additionally §2, First, "the heart of the Railway Labor Act" (*Jacksonville Terminal*, 394 U.S. at 378-79), independently imposes upon management and labor the obligation 'to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes . . . in order to avoid any interruption to commerce or to the operation of the carrier growing out of any dispute between the carrier and the employees thereof." That obligation as well circumscribes the use of economic weapons by preventing the introduction of new substantive disputes during the self-help period.

This Court has long recognized that there is a fundamental incompatibility between an obligation to engage in good faith bargaining with a union and the act of unilaterally imposing upon employees a wage or term of employment not first presented to the exclusive representative for consideration at the bargaining table. *NLRB v. Crompton-Highland Mills*, 337 U.S. 217, 223-25 (1949); *NLRB v. Katz*, 369 U.S. 736 (1962). The National Labor Relations Board with the approval of this Court has recognized that this principle is of sufficient weight to support an implicit, albeit limited, status quo requirement in a statute which, in contrast to the RLA, does not state in terms an express requirement that working conditions must be maintained while the bargaining process goes forward. *Katz, supra; Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967) (working conditions may be changed only "after bargaining to an impasse, that is, after good faith negotiation have exhausted the prospects of concluding an agreement," and then only "by making unilateral changes that are reasonably comprehended within [the] pre-impasse proposals.").

Analogously, this Court has previously noted that apart from the more explicit status quo requirements in the RLA, there is as well an "implicit status quo requirement in the obligation imposed upon both parties by § 2 First, to exert every reasonable effort to settle disputes without interruption to interstate commerce." *Detroit and Toledo Shore Line RR, supra*, 396 U.S. at 151. *See Chicago & Northwestern Ry. Co. v. United Transportation Union*, 402 U.S. 570 (1971).

The difference between the NLRA's implicit status quo requirement and the RLA's express requirement is, of course, that while the NLRA largely permits the parties to set their own parameters for time and extent of bargaining, the RLA goes on to prescribe, in §§ 5, 6, and 10 of the Act, the steps to be followed in endeavoring to reach agreement and in so doing defines the significant, time consuming obligations to be met during that period.

Were a strike to be the occasion for a carrier to tear up and annul, so to speak, the entire collective bargaining agreement, labor-management relations would revert to the jungle. A carrier could then use

> the occasion of a strike over a simple wage and hour dispute to make sweeping changes in its work rules so as to permit operation on terms which could not conceivably have been obtained through negotiation. Having made such changes, a carrier might well have little incentive to reach a settlement of the dispute that led to the strike. It might indeed have a strong reason to prolong the strike and even break the union. The temptation might be strong to precipitate a strike in order to permit the carrier to abrogate the entire collective bargaining agreement on terms most favorable to it. The processes of bargaining and mediation called for by the Act would indeed become a sham if a carrier could unilaterally achieve what the Act requires be done by the other orderly procedures. [*F.E.C.*, 384 U.S. at 247].

And, of course, by necessary implication, a union may only strike over issues as to which it has exhausted the statutory procedures, and not over demands the union has never presented to the employer for consideration.

As a consequence, under the RLA, even during the self-help period, except for those wages, rules, and working conditions that are in dispute (and except for certain, "reasonably necessary" changes that an employer receives permission temporarily to alter during a strike, *see F.E.C.*, 384 U.S. at 246), *the workplace is governed during and after any strike by the terms of the agreement in place when the dispute began*, (*id.* at 245; *id.*, at 249 (White, J., dissenting) ("The Court agrees that § 2 Seventh forbids the carrier itself to make any changes in the contract other than those on which bargaining has taken place.")). Thus, "collective bargaining agreements [which] are the product of years of struggle and negotiations . . . [and] represent the rules governing the community of striking employees and the carrier" are preserved and the workplace "community is not destroyed by the strike." *F.E.C.*, 384 U.S. at 246.[20]

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[20] As noted (n.2, *supra*), *TWA I*, 809 F.2d 483 (8th Cir. 1987) was affirmed by an equally divided Court. Because the briefs in that case discussed at length the limits upon the parties' self-help imposed by the very specific bargaining obligations imposed by the RLA, with one exception, we do not repeat those arguments here.

One of the central issues in *TWA I* was whether the agreement in that case terminated by its own terms or whether, as both the district court and the court of appeals in that case held, and as the district court has since reaffirmed, the language of the duration clause indicated only that the agreement could be amended, but not terminated. *IFFA v. TWA*, 682 F. Supp. 1003, 1006 (W.D. Mo. 1988) (the parties generally referred to the duration date in the contract, July 31, 1984, as the "amendable date"); *IFFA v. TWA*, No. 86-6030–CV-SJ-6 (W.D. Missouri) Order Granting Partial Summary Judgment on Striker Rights to Flight Service Manager Positions (May 26, 1988) 11 ("the 'amendable' nature of the contract the parties chose to sign . . . has been solidly reconfirmed in the negotiating history I heard after the dues decision [*TWA I*].)" (These statements were made by the District Court following 30 days of trial in No. 86-6030 regarding allegations that TWA had breached its obligations under RLA § 2 First in the negotiations that led to the strike.)

In *TWA I*, it may have made a difference whether the terms of the prior agreement that were not in dispute carried forward into the post-status quo period as a matter of contract, or as a matter of statute (or both). The reason this distinction came into play is that TWA argued there (in the narrower of its two major contentions) that whatever may be the case as to terms and conditions of employment generally, union security provisions could continue forward into the post-impasse period *only if there was a continuing collective agreement*. As TWA read § 2, Eleventh of the RLA, the statute particularly so requires *with respect to union security clauses*. *See*, disagreeing with this contention, *TWA v. IFFA*, No. 86-1650, Respondent's Brief at 39-45; *id.*, Brief of the AFL-CIO as amicus curiae at 19-22.

In this case however, the question of whether there are special rules that affect union security clauses is not implicated. Moreover, regardless of how the contract might be construed, here it is enough that provisions of the statute itself—in particular § 2 First and § 2 Seventh of the RLA—of their own force ordinarily forbid the parties to alter contractually-established terms and conditions

Second, as a necessary part of the preservation of the workplace "community" under the RLA, "the Railway

Labor Act is more concerned [than the NLRA] with continuance of the employer-employee relationship." *United Industrial Workers v. Board of Trustees of Galveston Wharves*, 400 F.2d 320, 329-30 (5th Cir. 1968) (Wisdom, J.). *See also National Airlines v. International Ass'n of Machinists*, 416 F.2d 998, 1004 (5th Cir. 1969); *Empresa Ecuatoriana de Aviacion v. District Lodge*, 690 F.2d 838, 845 (11th Cir. 1982) ("the policy of the Act . . . is to keep the employer-employee relationship intact").[21]

The safety concerns that underlay the addition of airlines to the RLA are particularly served by this continuity of employment principle. Frequent or mass turnover in the workforce is hardly calculated to provide "insurance against lowering of the morale of the service." *See* pp. 23-24, *supra*. Thus, one goal of the RLA as applied to the airlines is to promote the retention of the seasoned employees most likely to protect the public interest in safety. *See* H.R. Rep. No. 2243, 74th Cong., 2d Sess. (1936) 3, *reprinted in RLA Leg. Hist.* 1052; S.Rep. No. 895, 74th Cong., 1st Sess. 1 (1935), *reprinted in RLA Leg. Hist.* 1039 ("all that can be said for the need of able, alert, well-trained and responsible employees to man the railroads of the country applies with at least equal force and effect to the employees required to man the air lines of the country; and by the same token, anything which makes for stability in the labor relations and good morale

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of employment other than by the use of procedures prescribed in § 6 of the Act. *See TWA I* Brief for Respondents 20-30, 37-39; *id.*, Brief of the AFL-CIO as amicus curiae at 5-10.

[21] Because of the RLA's special concern for continuity of the employment relationship, *National Airlines* held inapplicable to the RLA the NLRA rule that employers may discharge employees who engage in illegal strikes or other unprotected conduct. 416 F.2d at 1004. "To allow the carrier to discharge all employees who strike in violation of the Railway Labor Act would undermine the Act's emphasis on the continuance of the employer's operations and the employer-employee relationship." *Id.*

of the railroad industry applies also to the flying industry").[22]

Finally, an essential concomitant of the special RLA concern for stable labor relations is continuity of bargaining relations generally, through protection of the ability of the bargaining representative effectively to represent employees:

> A primary purpose of the major revisions made in 1934 was to strengthen the position of the labor organizations *vis-a-vis* the carriers, to the end of furthering the success of the basic congressional policy of self-adjustment of the industry's labor problems between carrier organizations and *effective* labor organizations. . . . [I]n prescribing collective bargaining as the method of settling railroad disputes, in conferring upon the unions the status of exclusive representative in the negotiation and administration of collective agreements, and in giving them representation on the statutory board to adjust grievances, Congress has given the unions a clearly defined and delineated role to play in effectuating the basic congressional policy of stabilizing labor relations in the industry. [*International Association of Machinists v. Street*, 367 U.S. 740, 759-60 (1961) (emphasis supplied)].

It is because "this railroad labor code was . . . infused with the purpose of securing self-adjustment between the effectively organized railroad unions and *the equally effective railroad unions*" (*Elgin, supra*, 325 U.S. at 752 (Frankfurter, J., dissenting, *quoted in Street*, 367 U.S. at 760 (emphasis supplied)) that the statutory scheme endeavors to prevent employer actions calculated to undermine the sta-

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[22] Similarly, on the railroads, the RLA's goal was to create "an instrument of government" for a stable workforce:

> The railroad world is like a state within a state. Its population of some three million, if we include families of workers, has its own customs and its own vocabulary, and lives according to rules of its own making. . . . [*Elgin, J. & E. Ry. v. Burley*, 325 U.S. at 751-52 (Frankfurter, J., dissenting) (quoting Garrison, The Railroad Adjustment Board: *A Unique Administrative Agency*, Yale L.J. 567, 568-69 (1937)).]

bility of the union selected by the employees as their exclusive representatives.

(iii) While preserving the continuity of labor relations across any self-help period in these three ways, the RLA does not, of course, disable employers from responding to employee strike action by deploying economic weapons of their own. The Act does, however, require that such responses respect the basic statutory preference for labor relations stability generally, and for continuity of working conditions, continuity of employer-employee relationships, and continuity of the bargaining relationship specifically.

For example, obviously inherent in a statutory scheme that relegates the disputants to a test of economic strength after attempts to reach a consensual agreement have failed is the notion that it cannot be a violation of the statute without more to prevail in that economic struggle. *Cf. American Ship Building Co. v. NLRB*, 380 U.S. 300, 313 (1965). Thus, insofar as an employer self-help tactic is to maintain operations in order to improve the employer's economic position during the strike, the fact that such operations may prolong the strike, leave the employees without income for a long period of time, and induce the union eventually to call off the strike without achieving the union's economic goals because the members can no longer afford to be without work cannot add up to a violation of § 2 Fourth.

It is to be observed, however, that such a tactic, standing alone, does not renounce the existing terms and conditions of employment for the post-strike period, reconstitute the workforce permanently, or undermine the solidarity of the employees in their support for their labor organization. Rather, the impact is *temporary*, and is on the *striking workforce as a whole*; there is no necessary purpose or effect to split off individual employees from the group, and thereby to undermine the ability of the employees to act collectively either as to this particular dispute or as to future disputes.

There is, in addition, a second basis under the RLA for recognizing an employer's right to continue operations during a strike. Under the statute

> The carrier's right of self-help is underlined by the public service aspects of its business. "More is involved than the settlement of a private controversy without appreciable consequences to the public." . . . In our complex society, metropolitan areas might suffer a calamity if rail services for freight or for passengers were stopped. . . . [This is] not to say that the carrier's duty to operate is absolute, but only to emphasize that it owes the public reasonable efforts to maintain the public service at all times, even when beset by labor-management controversies and that this duty continues even when all the mediation provisions of the Act have been exhausted and self-help becomes available to both sides of the labor-management controversy. [*F.E.C.*, 384 U.S. at 245].

As the Court in *F.E.C.* went on to hold, this obligation to attempt to operate during a strike justifies, under the RLA, certain limited inroads into the stability of labor relations that is at the core of the statute. In particular, a carrier is entitled to 'improvise[] and employ[] an *emergency* labor force" (384 U.S. at 246, emphasis supplied), and may seek court approval *temporarily* to alter those contractually-established working conditions that are not the subject of the underlying dispute but that make operation with a less numerous, temporary workforce impossible (*id.* at 246).

At the same time, and critically for present purposes, the Court in *F.E.C.* ruled that any such accommodation of the RLA's basic stability premises to an employer's needs in attempting to operate during a strike "must be closely confined and supervised." 384 U.S. at 246. Toward this end, the Court made clear that any such accommodation should be, if possible, temporary rather than permanent:

> [A]uthorization to deviate in part from the collective bargaining agreement would, as FEC readily

> concedes, terminate at the conclusion of the strike. At that time, the terms of the earlier collective bargaining agreement, except as modified by any new agreement of the parties, would be fully in force. [384 U.S. at 247].

And any such accommodation of the employer's needs in operating during a strike must be substantively and procedurally limited as well:

> While the carrier has the duty to make all reasonable efforts to continue its operations during a strike, its power to make new terms and conditions governing the new labor force is strictly confined, if the spirit of the Railway Labor Act is to be honored. The Court of Appeals used the words "reasonably necessary." We do not disagree, provided that "reasonably necessary is construed strictly. The carrier must . . . make only such changes as are truly necessary in light of the inexperience and lack of training of the new labor force or the lesser number of employees available for the continued operation. The collective bargaining agreement remains the norm; the burden is on the carrier to show the need for any alteration of it, as respects the new and different class of employees that it is required to employ in order to maintain that continuity of operation that the law requires of it. [384 U.S. at 247-48].

By recognizing these limitations upon the employer's use of economic weapons, the Court moved to assure the greatest possible preservation of: (1) the "rules governing the community of striking employees and the carrier" (384 U.S. at 246); (2) the "community" of employees itself (*id.*, at 246-47) ("the community is not destroyed by the strike, as the strike represents only an interruption in the continuity of the relation"); and (3) the labor-management community expressed in the bargaining relationship (*id.*, at 247) (the power to change employment conditions during a strike must be strictly confined so as to avoid a temptation "to prolong the strike and even break the union").

3. *The RLA and the Distribution of Post-Strike Jobs*:

The course TWA pursued in maintaining operations during the 1986 strike threatened the very RLA stability principles the Court in *F.E.C.* sought to preserve through careful supervision of employer self-help during a strike. And there has been no showing that the standards for justifying such destabilizing practices during strikes has been met here.[23]

A. *First*, by refusing reinstatement to full-term strikers more senior than the crossovers who retained those positions, while maintaining an overall seniority system, the company fundamentally interrupted the continuity of terms and conditions of employment from the pre-strike to the post-strike period.

In the structure established by the TWA-IFFA collective bargaiinng agreement, and in effect during the post-strike period by virtue of the statute (*see* pp. 24-26, *supra*), seniority "expresses in a form appropriate to particular industrial situations the notion that people acquire property-like rights in employment opportunities." Meyers, *The Analytic Meaning of Seniority*, in Proceedings of the Eighteenth Annual Meeting, Industrial Relations Research Ass'n. (1966) at 8. In this instance, seniority carried with it the general privilege to retain employment over more junior employees when there were not enough active jobs to go around,[24] as well as the privilege

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[23] The discussion in the text assumes that the replacement of strikers by outside permanent replacements was proper because "reasonably necessary" to enable the employer to operate during the strike, but does so only on the basis the union has yet to prove otherwise. *See* n.5, *supra*. On the principles generally advocated in the text, however, the second cause of action could go forward, and IFFA would be put to its proof on the question whether, as the complaint alleged, TWA could have attracted sufficient temporary replacement flight attendants to operate without promising job retention at the conclusion of the strike.

[24] The contract accomplished this result by providing (1) that senior employees, if furloughed, could displace more junior employees in order to retain paid status; and (2) that on return from voluntary leaves, more senior employees could displace more junior employees. (Stipulations, Exhibit 1, Art. 15D & E, pp. 91-92).

to obtain the more favored domiciles and classifications over more junior employees.

Had these principles been followed in distributing post-strike positions among the original members of the striking bargaining unit, the result would *not* have been to displace all the crossovers, but rather to return matters to what they would have been, as among the group of employees who determined collectively to strike in support of their bargaining position, had there been no strike. The result of TWA's policy, in contrast, is to recalibrate the internal relationship among the members of the prestrike workforce so that benefits and burdens after the strike—most importantly, an immediate position in the active workforce—are arranged in part on the basis of the degree of fealty to the company, rather than upon the neutral seniority principle. The effect, as in other instances in which a generally applicable seniority rule is ignored, is necessarily "disruptive and demoralizing . . . , for it [is] viewed as depriving employees of rights earned in accordance with a just principle . . . [and] as taking rights away from one person and giving them to another." Summers & Love, *Work Sharing As An Alternative to Layoffs by Seniority: Title VII Remedies in Recession*, 124 U.Pa.L. Rev. 3, 893, 903-04 (1976).

That the collective bargaining agreement did not in terms provide for reinstatement of strikers according to seniority (App. Cert. 22) is not relevant in this context. Collective agreements in general address the "community" of employees and employer as the community ordinarily functions; strikes are an "interruption in continuity of that community" (*F.E.C.*, 384 U.S. at 247), and, thus, are not generally covered in terms by the agreements. That is why, presumably, the agreement in *F.E.C.* had no provision for suspension of any of its working rules in the event of a strike. The Court in *F.E.C.*, nonetheless held that the *RLA itself* preserves the contractually-established pre-strike working relationships *to the degree reasonably possible*, in order to preclude any fundamental

dislocation between the pre-strike and post-strike employment world by reason of the strike.

By a parity of reasoning, the RLA should be read to require that as among the members of the employee group who worked under the pre-existing agreement and determined collectively to exercise their statutory right to strike, the immediate post-strike employment positions should be distributed according to the same general seniority principles that, before the strike, governed analogous situations in which there were more employees available than work. To do otherwise is to deny "expectations reinforced by a sense of rightness of the basic principle of length of service." Summers & Love, *supra*, at 904.[25]

Second, TWA's program for distributing post-strike positions in the active workforce significantly impairs the

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[25] *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275 (1940) is suggestive in this regard. *Fishgold* involved the application of a veteran's statute protecting the right of veterans to return to their pre-strike employment position "without loss of seniority" and "as having been on furlough or leave of absence" during their service in the armed forces. 328 U.S. at 284. The Court recognized that individuals on furlough or leave remain employees, have "a continuing relationship with the employer" and "retain[] a right to be restored to work under specified conditions." 328 U.S. at 287.

In defining the employment "position" of an employee in a workplace in which seniority generally governs the determination of who is on furlough or leave and who is not, the Court held that such a "position" is defined in large part by its rank in the seniority scale, so that a return veteran retains his "position" as long as he is "entitled to be recalled to work in accordance with his senority," even though there is, at the moment he returns to work, no active, paid work available for persons of his seniority rank. 328 U.S. at 287-88.

On the other hand, the Court indicated that to award the returning veteran a job in the paid, active workforce to which his seniority would *not* entitle him would be to grant him preference over other workers in the form of "a gain or step-up in seniority." 328 U.S. at 286. This was so as a matter of law, whether or not the collective bargaining agreement which created the seniority rights in the first place expressly covered the problem of return from the armed services.

"employer-employee relationship" contemplated by the RLA. While the permanent replacement of strikers with individuals from outside the workforce is not directly pertinent here (*see* n. 23, *supra*), such replacement obviously threatens a fundamental break in the "employer-employee" relationship as between the pre-strike and post-strike periods by adding to the workforce large numbers of additional employees and giving those individuals the active, paid positions over many pre-strike workers. Even if that disruption can itself be justified as "reasonably necessary" given the need to attract new employees through the promise of permanence—a question that would be open on remand in this case under Count II of the Complaint (*see* n.5, supra)—it is a disruption that the Act surely disfavors. As such, the disruption caused by this break in the pre-existing employer-employee relationship should be "strictly confined if the spirit of the Railway Labor Act is to be honored." *F.E.C.*, 384 U.S. at 248.

Consistent with that principle, the employer-employee relationship with regard to the active positions still available after the permanent replacements are accounted for should not be further disrupted. And, disadvantaging those employees with longer-term employment who did not abandon the strike during its course, in favor of more junior employees who did abandon the strike effort plainly constitutes such a further disruption. That practice removes from the workplace the most seasoned employees, replacing them with individuals with less work experience and less of a long-term commitment to the work force.

Finally, and of great significance, TWA's program for according junior crossovers priority over senior full-term strikers fundamentally destabilized the bargaining relationship between TWA and IFFA. That program, unlike the simple assurance of permanence to outside replacements, set up a competition *among* those individuals who participated in the original decision to strike, and thereby undermined the group's ability to take the

collective action that it is the very purpose of the statute to protect. As such, the crossover policy threatened the viability of the strike, and of future efforts at collective action, in a way quite different from the effect of permanent replacement *simpliciter*: While permanent replacement may lead to a *collective* decision to abandon the strike because of the fear that more and more post-strike jobs for the original strikers are being lost, a permanent replacement policy, standing alone, does not encourage *individual* decisions to split off from the group unless it is combined with a reward—post-strike job retention—for those who make such a decision. Cf. *Air Line Pilots Association v. United Airlines, Inc.*, 802 F.2d 886 (7th Cir. 1986) (under *F.E.C.*, an employer must show reasonable business justification before implementing self-help measures that "on their face, undercut the union's ability to function as an effective representative for its members.")

B. Under *F.E.C.*, it is possible that these detrimental impacts upon the RLA's labor stability policy, as well as the facial violation of § 2 Fourth involved, could possibly be justified if the employer had met its burden of demonstrating to a court that its crossover policy was "truly necessary" (384 U.S. at 248) in order to operate during the strike. In this instance, however, the employer made the promises of permanence to both the outside replacements and the crossover without first making any attempt to attract either *temporary* replacements or crossovers who were *not* promised exemptions from neutral seniority rules. *F.E.C.* makes it plain that the fact that it may have been *easier* to attract both replacements and crossovers by promising retention in the face of the seniority system after the strike is insufficient in itself under the "reasonably necessary" test, and that the employer has the burden of showing that employment offers subject to the seniority system would not have sufficed.[26]

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[26] It is worth noting that, as *Fishgold, supra*, makes clear, an offer of a position that includes the prospect of being displaced by

Moreover, whatever may be the case with respect to outside permanent replacements (*see* 43-44, *infra*), the employer can not meet that burden by invoking a presumption that crossovers would not return to work absent a promise of retention in the active workforce at the strike's end.

In the first place, the job the crossovers left is the job to which they are free to return. Thus, in deciding whether to return to employment during the strike, crossovers, unlike replacements, are not giving up their regular employment (or their search for regular employment) but are reclaiming such employment. The employer, therefore, has no need to offer permanence in order to induce a crossover to give up a *different*, permanent job.

In addition, the *basic* economic power the employer has over the strikers is that as long as the strike continues, the strikers are deprived of their livelihood. This Court has always understood that this employer power constitutes a powerful inducement in itself to abandon a strike, whether individually or collectively. Thus, in elaborating upon the reasons that an employee who at first supported a strike effort might change his or her mind, this Court alluded to "the specter of hardship to his family," and to the fact that "the ease with which the employer replaces the strikers may make the strike seem less provident," presumably because of the likelihood that the employer will be able to operate for a long time without the strikers and thereby increase the "specter of hardship" even more. *NLRB v. Granite State Joint Bd.*, 409 U.S.

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a more senior person is still an offer of permanent employment. "An employee on furlough or leave of absence . . . retains a right to be restored to work under specified conditions. . . A 'position' exists even though no work is then available." 328 U.S. at 288. The question in this case, thus, is not whether the crossovers or the strikers should obtain permanent positions but, *as among* permanent employees, who shall be in the active workforce on the day after the strike ends and who shall await vacancies in paid positions through attrition or economic expansion.

213, 218 (1972); *see also American Steel Foundries*, 257 U.S. at 209.

Consequently, while there may well be a basis for erecting a presumption that offers of permanence to outside replacements are "truly necessary" in order to operate during a strike and placing the burden to prove otherwise on the injured full-term strikers or their union,[27] there is no basis for any such presumption with regard to crossovers. Rather, as in *F.E.C.*, the burden must be on the *employer* to prove to a court that such disruption as will be caused by its plan for operations during the strike is "reasonably necessary . . . construed strictly." 384 U.S. at 248.

Where, as here, no attempt was made to operate *without* granting preference to crossovers—nor was any attempt made, by analogy to *F.E.C.*, to obtain court approval of the preference acccorded corssovers by demonstrating that the preference was "truly necessary" to obtain sufficient employees to operate during a strike—as a matter of law, that standard has not been met and the judgment below must be upheld.[28]

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[27] This is the theory of Count Two of the Union's Complaint in this case: The lack of a "legitimate and substantial" business justification is alleged as part of the union's affirmative case. (App. Cert. 55).

[28] We note that while TWA argues repeatedly that such a result is anomalous in that it gives permanent replacements from outside the workforce preference over returning strikers, that result is not at all anomalous. Under the approach for which we argue, the same basic analysis would apply to outside replacements and to crossovers. The differences that result come about because when the problem is looked at in terms of the *F.E.C.* analysis—and of the purposes that analysis serves—in the case of permanent replacements, a presumption of necessity may be appropriate. The fact that application of a single basic standard to diverse circumstances may lead to diverse results is not surprising and does not undermine the force of our analysis.

III. This Court's Cases Decided Under The NLRA, Insofar As They Are Relevant To The RLA Context, Are Consistent With The Proposition That TWA's Promise Of Preference To Crossovers Over More Senior Strikers As Illegally Coercive Of The Right To Strike.

Petitioner, and, for the most part, its amici, ignore in their arguments the pertinent RLA considerations discussed above, and base their presentations instead upon NLRA precedents. Their argument, put succinctly, is that *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938), creates an employer privilege to offer permanent positions to strike replacements; that this privilege is an absolute one, and does not require any showing that the promise was necessary to continue operations during the strike; that the privilege applies equally to crossovers and to replacements from outside the bargaining unit; and that the privilege applies despite any detrimental impact its exercise may have upon post-strike relationships between employees arising from the disruption of seniority relationships that ordinarily govern the distribution of work, benefits and burdens in a particular workplace. The fatal defect in this analysis is that while the first premise is true, the second, third, and fourth premises have never been approved by this Court, and are in large part inconsistent with the reasoning in this Court's cases.

1. In *Mackay*, this Court established *two* principles relating to the reinstatement of strikers to their jobs after a strike is over. The first, which constitutes the actual holding of the case, is that an employer may *not* distribute poststrike job opportunities on the basis of union activism, and thus may *not* refuse reinstatement to those most active in favor of those less active. 304 U.S. at 346-47. The second, which was *dictum* because not presented by the facts, is that "[it is not] an unfair labor practice to replace . . . . striking employees with others in an effort to carry on the business [or to refuse] . . . to discharge those hired to take the

place of strikers, upon the election of the latter to resume their employment." *Id.* at 345-46.

This Court's later cases make clear that the second *Mackay* rule is only a narrow exception drawn against the first one—*viz.*, the general rule prohibiting interference with or discrimination against employees for exercising the statutory right to strike. Under that rule, an employer who refuses to reinstate economic strikers at the end of the strike commits an unfair labor practice unless he can show that he acted because of "legitimate and substantial business justifications." *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967):

> If, after the conclusion of the strike, the employer refuses to reinstate striking employees, the effect is to discourage employees from exercising their right to organize and to strike . . . and it is an unfair labor practice to interfere with the exercise of these rights. Accordingly, unless the employer who refuses to reinstate strikers can show that his action was due to "legitimate and substantial business justifications," he is guilty of an unfair labor practice. *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967). The burden of proving justification is on the employer. . . . In some situations, "legitimate and substantial business justifications" for refusing to reinstate striking employees who engaged in an economic strike have been recognized. One is when the jobs claimed by the strikers are occupied by workers hired as permanent replacements during the strike in order to continue operations. *NLRB v. Mackay Radio & Telegraph Co.* . . . . [389 U.S. at 379].[29]

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[29] That the Court in *Fleetwood* was characterizing the *Mackay* rule as an exception seems readily apparent. Subsequent court of appeals decisions applying *Mackay* have also characterized it as such. *International Ass'n of Machinists & Aerospace Workers v. J.L. Clark Co.*, 471 F.2d 694, 696 (7th Cir. 1972); *Giddings & Lewis Inc. v. NLRB*, 675 F.2d 926, 930 (7th Cir. 1982) (quoting *NLRB v. Mars Sales & Equipment Co.*, 626 F.2d 567, 572 (7th Cir. 1980)); *George Banta Co. v. NLRB*, 686 F.2d 10, 19-20 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983).

Further, this Court has also recognized that even where there *is* a "legitimate and substantial business justification" for an employer's adverse treatment of strikers as compared to those employees who work during a strike, the detrimental impact on the right to strike can in certain circumstances be so severe as to constitute an unfair labor practice. Thus, in *NLRB v. Erie Resistor Corp.*, *supra*, the court of appeals had held that

> inherent in the right of an employer to replace strikers during a strike is the concomitant right to adopt a preferential seniority policy which will assure the replacements some form of tenure, provided the policy is adopted *solely* to protect and continue the business of the employer. [373 U.S. at 226, *quoting* 303 F.2d at 364].

This Court rejected that approach, not because of any doubt that the employer could more easily attract replacements and crossovers by offering preferential seniority treatment, but because the severe impact on the exercise of the right to strike went beyond the more limited effect sanctioned in *Mackay*, and beyond that which could be tolerated under the Act:

> The Court of Appeals and respondent rely upon *Mackay* as precluding the result reached by the Board but we are not persuaded. Under the decision in that case an employer may operate his plant during a strike and at its conclusion need not discharge those who worked during the strike in order to make way for returning strikers. It may be, as the Court of Appeals said, that "such a replacement policy is obviously discriminatory and may tend to discourage union membership." But *Mackay* did not deal with superseniority, with its effects upon all strikers, whether replaced or not, or with its powerful impact upon a strike itself. Because the employer's interest must be deemed to outweigh the damage to concerted activities caused by permanently replacing strikers does not mean it also outweighs the far greater encroachment resulting from super-seniority in addition to permanent replacement. [373 U.S. at 232].

Thus, this Court's NLRA precedents do *not* sanction *any and all* employer actions taken in order to make it easier to operate during a strike; rather, those precedents prohibit employer actions which go beyond the minimum that is necessary "in an effort to carry on the business."

2. In particular, this Court's NLRA cases in no way sanction two premises that are essential to petitioner's position in this case.

A. First, petitioner assumes that the right to hire permanent replacements is absolute, and that an employer can do so even if he could secure an adequate number of workers during a strike through offers of temporary employment. As the quotations above indicate, however, this Court has consistently explained *Mackay* as a situation in which permanent replacement was offered *in order to continue operation of the business.* Moreover, this Court has also indicated that absent that substantial business justification, permanent replacement would violate the NLRA because the fear of loss of jobs impairs the exercise of the right to strike. *Erie Resistor*, *supra*, 373 U.S. at 232; *see Belknap v. Hale*, 463 U.S. 49 (1983) (Blackmun, J., concurring) ("Promises of permanent employment, and subsequent retention of replacements, are permitted only because it is believed that the harm to protected activities is outweighed *by the employer's interest in operating its plant during a strike*") (emphasis supplied).[30]

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[30] The NLRB has held, as this Court noted in *Belknap v. Hale*, 463 U.S. at 505 n.8, that an employer may hire permanent replacements "at will", and need not demonstrate that the promise of permanence was made in order to continue operations during the strike. *Hot Shoppes, Inc.*, 146 NLRB 802, 805 (1964). The NLRB's basis for so holding, however, was not any expert view of its own; rather, the Labor Board read this Court's cases "as holding that the motive for such replacements is immaterial . . ." *Id.* And, while this Court in *Belknap* in turn noted *Hot Shoppes*, and stated that "[t]here are no cases in this Court that require a different conclusion", the *Belknap* Court did not purport to decide the *Hot Shoppes* question since "[t]hat issue is not posed in this case." 463 U.S. at 505 n.8. In short, the propriety of the NLRB's *Hot Shoppes* doctrine remains an open issue in this Court.

Thus, while the Court has not decided the question, it is far from clear that even under the NLRA, an employer can permanently replace striking employees without showing that it is "reasonably necessary" to do so. And there is certainly no basis for inferring from this Court's silence on this NLRA question that an employer governed by the RLA can, despite the heightened concern of that statute for continuity of the employer-employee relationship (*see* Part II, *supra*), replace strikers permanently although the employer could operate during the strike, and work less damage to the continuity of the workplace community by replacing the striking employees only temporarily.

B. Second, this Court has not yet addressed directly the question whether, under the NLRA, promises of preferential poststrike retention can be made to crossovers as opposed to replacements from outside the bargaining unit, either in general or, in particular, in situations in which seniority principles generally govern the distribution of positions within the active workforce among permanent employees.

Mackay itself did not involve crossovers, *viz.*, *employees from the bargaining unit* who chose to abandon the strike and return to reclaim their jobs. The replacements in *Mackay* were individuals who came from other cities where they had been permanently employed. They were thus outsiders to the prestrike employee compliment who were "*hired*" as replacements, in contrast to the strikers who desired "to resume their employment." The *Mackay* Court therefore referred to the employer's need to give "assurances . . . to those who *accepted employment* during the strike that if they so desired their places might be permanent . . ." 304 U.S. at 345-46 (emphasis added).

Similarly in *Fleetwood*, in articulating the *Mackay* exception as it applied to a refusal to reinstate strikers, the Court used the phrasing ". . . when the jobs which the strikers claim are occupied by workers *hired as permanent replacements* during the strike in order to continue operations." 389 U.S. at 379 (emphasis added). Then, turning to the facts in *Fleetwood*, the Court specifically noted the number of replacements "hired" during the strike but did not even refer to the numerous crossover employees (almost half of the original employee complement) who had chosen not to go out on strike. *Id.*, at 380. In *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 27 (1967) (emphasis supplied), the Court referred to those who worked during the strike as ". . . nonstrikers, persons *hired as replacements for strikers*, and some original strikers who had later abandoned the strike and returned to work." And in *Erie Resistor*, the Court consistently distinguished the term "replacements" from the term "strikers who returned to work" in explaining the rationale leading to its refusal to expand the *Mackay* rule so as to allow an employer's grant of super-seniority to both of these groups. 373 U.S. at 231-32. In fact, in the underlying NLRB decision in *Erie Resistor Corp.*, 132 NLRB 621, 623 (1961), the Board specifically noted:

> Further permitting an employer to grant superseniority to *all* who work during a strike greatly enlarges the definition of "replacement" as envisaged by *Mackay*. Under the Supreme Court's *Mackay* decision, an employer during an economic strike is permitted to secure *new employees, or employees outside the bargaining unit*, to work permanently at unit jobs. But superseniority is normally offered not only to new employees . . . but to the bargaining unit employees themselves, if they abandon the strike, or chose not to join it. [Emphasis added].

Not only has this Court never held that a promise of post-strike preference to crossovers is always valid, but the concerns voiced by this Court in *Erie Resistor* largely revolve around the circumstance that in that case, the employer's policy gave preference to crossovers over full-term strikers:

> A super-seniority award necessarily operates to the detriment of those who participated in the strike as compared to nonstrikers. . . . Super-seniority made available to striking bargaining unit employees as

> well as to new employees is in effect offering individual benefits to the strikers to induce them to abandon the strike effort. . . . Extending the benefits of super-seniority to striking bargaining unit employees as well as to new replacements deals a crippling blow to the strike effort. . . This combination of threat and promise could be expected to undermine the striker's mutual interest and place the entire strike effort in jeopardy. [373 U.S. at 230-31].

The central point of these observations is that a policy that creates an incentive for the members of the striking employee group to *individually* abandon the strike for fear of losing out to other members of the group threatens the right to engage in collective action directly and impermissibly, by creating an incentive for preferring individual over group action.[31] The crossover preference policy in this case created, of course, precisely that incentive, and therefore had a seriously detrimental impact upon the group's ability to engage in collective

[31] It is no answer to the force of this factor to observe that strike replacements also have a protected right to engage in concerted activity. The NLRB has recognized that real distinctions exists between the situation of replacements and crossovers for purposes of assessing their community of interest during concerted strike activity.

For example, an employer is permitted unilaterally to institute employment terms for *replacements* during an economic strike totally different from what the employer had offered the union in negotiations for its bargaining unit employees as an incident of its *Mackay* privilege to hire permanent strike replacements. Indeed, the employer has no statutory duty to bargain over those employment terms for the replacements. *Imperial Outdoor Advertising*, 192 NLRB 1248 (1971); *Leveld Wholesale, Inc.*, 218 NLRB 1344 (1975); *Capitol Husting Co. v. NLRB*, 671 F.2d 237 (7th Cir. 1982). An employer may *not* make such an offer to crossovers. *Capitol-Husting Co. v. NLRB, supra*; *McCormick-Shires Millwork, Inc.*, 286 NLRB No. 68 (1987). Thus, under NLRB law, the community of interest of crossovers lies with the overall pre-strike employee group and not with new-hire third parties attracted from other employment.

action quite different from that worked by hiring outside replacements alone.[32]

Moreover, the other primary reason that *Erie Resistor* found the policy in that case so much more destructive of employee rights and of the NLRA's statutory policies than that in *Mackay* as to constitute a *per se* violation of the NLRA is present to some degree here as well: Like the super-seniority policy in *Erie Resistor*, TWA's policy in this case "creates a cleavage in the plant continuing long after the strike is ended." *Erie Ressitor*, 373 U.S. at 231.

One aspect of TWA's policy is to redistribute jobs internally during the strike so that the early returning strikers were able to obtain, *permanently*, the more desirable jobs for which the seniority of many full-term strikers would have entitled them. The result, for *returned* full-term strikers, is that their pre-strike expectations regarding their job assignments were indefinitely defeated in favor of junior crossovers.[33]

[32] Two court of appeals cases particularly emphasize the importance of the distinction between an employer policy that threatens the strikers as a group, and one that creates an inducement for strikers to defect from the group, thereby undermining the collective nature of the effort that is at the heart of the NLRA. *See George Banta Co. v. NLRB*, 686 F.2d at 19 ("the relevant question is whether the employer has illegally burdened the statutory right to strike by artificially dividing the workforce into those who did not engage in strike activity and those who did . . . . Such division . . . may not be countenanced under the [NLRA] because the claimed business purpose does not outweigh the necessary harm to employee rights"); *International Ass'n of Machinists & Aerospace Workers v. J.L. Clark Co.*, 471 F.2d 698.

[33] The employer contention that preferential retention of the crossovers at the conclusion of the strike ". . . simply cannot create 'long-term conflict and division within the workforce' because by definition the strikers are not 'in the workforce,'" (TWA Br. 44), is specious reasoning clearly ignoring the reality of the situation. The senior full-term strikers clearly will have reason to bear *sustained* resentment, well beyond the time when they eventually do get reinstated, toward the junior cross-overs who delayed their return

Once again, there is no reason for this Court to reach in this case the question whether, under the NLRA, a policy favoring junior crossovers over senior full-term strikers is sufficiently more destructive of the right to engage in collective activity than a simple *Mackay* policy in favor of new hires as to constitute a *per se* unfair labor practice under *Erie Resistor*. Rather, our point is simply that the NLRA cases at least recognize that there *is* a distinction between the two kinds of policies, and that the distinction is in some cases determinative. For reasons already stated in Part II, *supra*, whatever may be the case under the NLRA, this distinction is one of several reasons for holding TWA's crossover job retention program invalid under the *Railway Labor Act*.[34]

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and caused them to lose substantial amounts of wages and benefits purely by virtue of abandoning the strike early.

We note that there is no indication in *Mackay* that the employer had any seniority or other system in place that generally determined questions of assignment to the active workforce or assignment within that workforce; the likelihood is that there was no such system, because the strike in *Mackay* arose before any collective bargaining agreement had even been signed with the employer. *Mackay Radio & Telegraph Co.*, 1 NLRB 201 (1936). *See* p. 34, *supra* (where a seniority system is in place, resentment of policies that override that system is acute).

[34] There are two other points worth noting.

First, if this Court were to address a reinstatement program similar to the one in this case under the NLRA, the result might well turn on a *combination* of the two issues we have indicated in the text are open under the NLRA. Given the more severe impact of a crossover preference upon collective rights, a more precise showing of a need to provide that preference in order to operate during a strike might be required. We note in this regard that for the same reasons as pertain under the RLA (pp. 37-38, *supra*), there is considerably less basis for *presuming* the necessity of post-strike retention promises for crossovers than for permanent replacements.

Second, in criticizing the rationale and result reached by the Court of Appeals, the NLRB in its amicus brief emphasizes the crossover's rights to reinstatement to "his job" as being based upon "the same entitlement" that a full-term striker has with respect to regaining "his job." Once the crossover has returned to "that

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job," the Board maintains, there is no vacancy "in that position" to which a full-term striker can later lay claim on the basis of his statutory right to be reinstated without discrimination . (NLRB Br. at 13). This approach is problematical at best, quickly breaking down in a factual situation, such as here, where the primary bargaining unit "jobs" or "positions" are so fluid and fungible as to make such a precise determination of whose job is filled and whose is not quite impossible.

Perhaps recognizing this inherent weakness in its main argument, the Board shifts gears somewhat and attacks IFFA's position, validated by the Eighth Circuit in the decision below, that crossovers cannot be granted permanent replacement status so as to give them a preference in reinstatement at the end of the strike. In effect, the Board argues, to treat crossovers only as "temporary replacements" and to grant them such limited reinstatement during the strike would be tantamount to penalizing the crossovers *themselves* for striking or, in the case of those who did not strike at all, for "the fact that *others* engaged in strike activities" which would have been statutorily [im]permissible." (NLRB Br. 14-15).

The Board, however, has approved private strike settlement agreements between unions and employers on a number of occasions which provide for senior full-term strikers "bumping" less senior strike replacements and crossovers. *E.g., Copaz Packing Corp.* (NLRB General Counsel's Advice Memorandum) 115 NLRB 1008 (1983), *George Banta Co.*, 256 NLRB 1197 (1981), enforced 686 F.2d 10 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 10082 (1983). There is therefore, simply no justification for the NLRB in this case to contend that TWA would have been guilty of an unfair labor practice under the NLRA if the Company had refused to grant the crossovers the right to be permanently retained and not displaced at the end of the strike by more senior full-term strikers.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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